No. 89-1567

In the Supreme Court of the United States

OCTOBER TERM, 1989

VINCENT ASPROMONTI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Currency and Foreign Transactions Reporting Act, 31 U.S.C. 5311 *et seq.*, and the regulations promulgated thereunder, prohibit a customer from causing a financial institution to fail to file Currency Transaction Reports.

2. Whether petitioner was denied the effective assistance of counsel.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A6) is unreported. The opinion of the district court (Pet. App. A7-A12) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 18, 1989. The petition for a writ of certiorari was filed on March 19, 1990 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of New York, petitioner was con-

victed on one count of conspiracy to cause a financial institution to fail to file Currency Transaction Reports (CTRs) and to make false statements in a government matter, in violation of 18 U.S.C. 371; and on three substantive counts of causing a financial institution to fail to file CTRs, in violation of 31 U.S.C. 5313 and 5322(b) (1982) (formerly 31 U.S.C. 1081 and 1059(2) (1976)). He was sentenced to a total of ten years' imprisonment and was ordered to pay a $500,000 fine. The court of appeals affirmed petitioner's convictions in an unpublished opinion, and petitioner did not seek further review at that time. He thereafter moved to vacate his sentence, pursuant to 28 U.S.C. 2255. The trial court denied that motion (Pet. App. A7-A12), and the court of appeals affirmed (Pet. App. A1-A6).

1. The evidence at trial, which is not in dispute, showed that between April 12, 1982, and September 30, 1982, petitioner and his confederates arranged to deposit $10 million into an account at Extebank, in Hauppauge, New York. Of that amount, approximately $7.6 million was deposited in cash, including 34 separate deposits in excess of $100,000. With the assistance of petitioner's co-defendant, George Ruggiero, then the assistant vice-president and branch manager of the bank, no CTRs were filed on any of the cash transactions. Gov't C.A. Br. 15-16.[1]

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[1] Under federal law, a financial institution is required to file a CTR whenever a customer makes a currency payment in excess of $10,000. 31 U.S.C. 5313 (1982) (formerly 31 U.S.C. 1081, 1082, 1083) (1976); 31 C.F.R. 103.22(a) (1982).

Section 5313(a) (31 U.S.C.) (1982) provides in relevant part:

> When a domestic financial institution is involved in a transaction for the payment, receipt, or transfer of United States coins or currency (or other monetary instruments the Secretary of the Treasury prescribes), in an amount, denomination, or amount and denomination, or under circumstances the Secretary prescribes by regulation, the institution and any other participant in the trans-

On direct appeal, the court of appeals affirmed petitioner's convictions – rejecting, in particular, his claim that an individual bank customer may not be held liable for causing a bank to fail to file CTRs. C.A. App. 607. Petitioner did not file a petition for a writ of certiorari from that judgment. On April 26, 1989, after retaining new counsel, petitioner filed a motion in the United States District Court for the Eastern District of New York to vacate his sentence pursuant to 28 U.S.C. 2255.

The district court denied the motion. Pet. App. A7-A12. The court noted first that under Second Circuit precedent petitioner was properly held liable for causing a bank to fail to file CTRs. *Id.* at A9. It also rejected the contention that certain amendments to the CTR provisions, enacted in 1986, cast doubt on the applicability of the provisions at the time of petitioner's offenses. *Id.* at A9-A10. Finally, the district court held that petitioner's trial and appellate counsel had not rendered ineffective assistance to him. The court found that trial counsel had not erred in failing to object to the admission of bank deposits made more than five years prior to indictment, in view of the fact that those

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action the Secretary may prescribe shall file a report on the transaction at the time and in the way the Secretary prescribes. * * *

Section 103.22(a) (31 C.F.R.) (1982) provides:

> Each financial institution shall file a report of each deposit, withdrawal, exchange of currency or other payment or transfer, by, through, or to such financial institution, which involves a transaction in currency of more than $10,000. Such reports shall be made on forms prescribed by the Secretary and all information called for in the forms shall be furnished.

Each Currency Transaction Report form contains the following provision (Treasury Form 4789 (1980)):

> * * * Multiple transactions by or for any person which in any one day total more than $10,000 should be treated as a single transaction, if the financial institution is aware of them.

deposits were part of a "continuing course of conduct." *Id.* at A11. The court also stated that petitioner's appellate counsel had submitted briefs on his behalf that were "forceful, articulate and coherent." *Id.* at A12.

2. The court of appeals affirmed in an unpublished order. Pet. App. A1-A6. The court refused to draw any inference "from the fact that Congress found it necessary to clarify the Bank Secrecy Act" in 1986. *Id.* at A4. The court stated that it would therefore "adhere to [its] earlier decisions that an individual may be liable pursuant to 18 U.S.C. § 2(b) for causing a financial institution to fail to file Currency Transaction Reports." *Ibid.* The court also held that petitioner had not been denied the effective assistance of trial and appellate counsel. *Id.* at A5.

ARGUMENT

1. Petitioner contends (Pet. 34-42) that this Court should review the government's theory that it is illegal to cause a financial institution to fail to file CTRs. The same claim has been before the Court in several recent cases, and in each case the Court has denied certiorari. See *Bruno* v. *United States*, 110 S. Ct. 721 (1990); *Meros* v. *United States*, 110 S. Ct. 322 (1989); *Lafaurie* v. *United States*, 486 U.S. 1032 (1988); *Perlmutter* v. *United States*, 485 U.S. 935 (1988); *Florez* v. *United States*, 484 U.S. 1060 (1988); *Giancola* v. *United States*, 479 U.S. 1018 (1986); *Heyman* v. *United States*, 479 U.S. 989 (1986). In our briefs in opposition in those cases, we noted that there has been some division among the circuits on this and related issues arising from prosecutions under Section 5313.[2] Congress, however,

[2] We have furnished counsel with a copy of our brief in opposition in the *Bruno* case, in which we restated the arguments that we had previously made in the *Meros*, *Lafaurie*, *Perlmutter*, *Florez*, *Giancola*, and *Heyman* cases.

has recently enacted the Money Laundering Control Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207-18, which is included as Subtitle H of the Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, § 1351, 100 Stat. 3207. The Money Laundering Control Act was expressly designed to overrule the cases that conflict with the result reached by the court of appeals here. The new law deprives the statutory issue presented in the petition of any continuing significance. Accordingly, petitioner's claim does not warrant further review by this Court.

a. Under Section 5313 and its accompanying regulations, only financial institutions have a duty to file CTRs in connection with cash transactions. Several courts of appeals have nevertheless recognized that under 18 U.S.C. 2(b) a defendant may still be held criminally liable for causing a financial institution to violate its statutory duties. *United States* v. *Lafaurie*, 833 F.2d 1468, 1470-1471 (11th Cir. 1987), cert. denied, 486 U.S. 1032 (1988); *United States* v. *Richeson*, 825 F.2d 17 (4th Cir. 1987); *United States* v. *Heyman*, 794 F.2d 788 (2d Cir.), cert. denied, 479 U.S. 989 (1986); *United States* v. *Cook*, 745 F.2d 1311 (10th Cir. 1984), cert. denied, 469 U.S. 1220 (1985); *United States* v. *Puerto*, 730 F.2d 627 (11th Cir.), cert. denied, 469 U.S. 847 (1984); *United States* v. *Tobon-Builes*, 706 F.2d 1092 (11th Cir. 1983). See also *United States* v. *Thompson*, 603 F.2d 1200 (5th Cir. 1979). Other courts have taken a contrary view, holding that because 31 U.S.C. 5313 and the applicable regulations do not impose on third parties a duty to file CTRs, Section 2(b) cannot be read to impose criminal liability on third parties who, by structuring their transactions, cause a financial institution to fail to file a CTR. See, *e.g.*, *United States* v. *Gimbel*, 830 F.2d 621, 624-625 (7th Cir. 1987); *United States* v. *Larson*, 796 F.2d 244 (8th Cir. 1986); *United States* v. *Reinis*, 794 F.2d 506, 508 (9th Cir.

1986); *United States* v. *Varbel*, 780 F.2d 758 (9th Cir. 1986); *United States* v. *Anzalone*, 766 F.2d 676 (1st Cir. 1985).

Whatever the merit of the latter decisions in construing Section 5313, Congress has totally revised the law in this area by enacting the Money Laundering Control Act of 1986. The explicit purpose of the new Act was to overrule the decisions in *Anzalone* and *Varbel* and to codify the decision in *Tobon-Builes*. Section 1354(a) of the Act, entitled "Structuring Transactions to Evade Reporting Requirements Prohibited," creates a new section of Title 31 (Section 5324 (Supp. V 1987)), which provides as follows:

> No person shall for the purpose of evading the reporting requirements of section 5313(a) with respect to such transaction—
>
> (1) cause or attempt to cause a domestic financial institution to fail to file a report required under section 5313(a);
>
> (2) cause or attempt to cause a domestic financial institution to file a report required under section 5313(a) that contains a material omission or misstatement of fact; or
>
> (3) structure or assist in structuring, or attempt to structure or assist in structuring, any transaction with one or more domestic financial institutions.

By its terms, the statute imposes criminal liability for causing a financial institution to fail to file a CTR, as petitioner did here, for the purpose of evading the reporting requirements of Section 5313. In formalizing these statutory obligations, Congress made clear that its purpose was to overrule the First and Ninth Circuit decisions in *United States* v. *Anzalone*, *supra*, and *United States* v. *Varbel*, *supra*, and the Eleventh Circuit decision in *United States* v. *Denemark*, 779 F.2d 1559 (1986). The Senate Com-

mittee on the Judiciary, reporting favorably on an identical provision in S. 2683, 99th Cong., 2d Sess. (1986), an earlier version of the money laundering bill, stated (S. Rep. No. 433, 99th Cong., 2d Sess. 21-22 (1986)):

> Under present law, money launderers are successfully prosecuted in some judicial circuits for causing financial institutions not to file reports on multiple currency transactions totaling more than $10,000 or causing financial institutions to file incorrect reports. In such cases, the actual money launderers are charged with violations of 18 U.S.C. 2 (aiding and abetting or causing another to commit an offense) and section 1001 (concealing from the Government a material fact by a trick, scheme, or device). For example, in *United States* v. *Tobon-Builes*, 706 F.2d 1092 (11th Cir. 1983), the Eleventh Circuit Court of Appeals upheld a conviction under 18 U.S.C. 1001 where the defendants had engaged in a money laundering scheme in which they had structured a series of currency transactions, each one less than $10,000 but totaling more than $10,000, to evade the reporting requirements. * * * In contrast, the First Circuit Court of Appeals, in *United States* v. *Anzalone*, 766 F.2d 676 (1st Cir. 1985), the Eleventh Circuit Court of Appeals in *United States* v. *Denemark*, 779 F.2d 1559 (11th Cir. 1986), and the Ninth Circuit Court of Appeals in *United States* v. *Varbel*, 780 F.2d 758 (9th Cir. 1986) have held that structuring currency transactions to avoid the reporting requirements did not violate 18 U.S.C. section 1001.
>
> Subsection (h) would codify *Tobon-Builes* and like cases and would negate the effect of *Anzalone*, *Varbel* and *Denemark*. It would expressly subject to potential liability a person who causes or attempts to cause

> a financial institution to fail to file a required report or who causes a financial institution to file a required report that contains material omissions or misstatements of fact. In addition, the proposed amendment would create the offense of structuring a transaction to evade the reporting requirements, without regard to whether an individual transaction is, itself, reportable under the Bank Secrecy Act.

The House intended precisely the same results when it formulated a virtually identical version of the money laundering provisions. The Committee on Banking, Finance and Urban Affairs stated (H.R. Rep. No. 746, 99th Cong., 2d Sess. 18-19 (1986)):

> In some judicial circuits, money launderers have been successfully prosecuted for causing financial institutions not to file reports on such multiple currency transactions. In such cases, defendants are charged with violations of 18 U.S.C. 2 (aiding and abetting or causing another to commit an offense) and Section 1001 (concealing from the government a material fact by a trick, scheme, or device). [3]
>
> In contrast, other cases have held that the Act and its regulations impose no duty on the customer to inform the financial institution of the structured nature of the transactions, that the reporting duties are placed solely upon the financial institution, and therefore, only a financial institution can directly violate the reporting requirements. [4]
>
> The Committee believes that Section 2 of H.R. 5176 would resolve the legal issues raised by the various cir-

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[3] For this proposition, the House Report cited the Eleventh Circuit's decision in *Tobon-Builes* (H.R. Rep. No. 746, *supra*, at 18 n.1).

[4] For this proposition, the House Report cited, *inter alia*, *Anzalone* and *Varbel* (H.R. Rep. No. 746, *supra*, at 19 n.2).

> cuit courts by expressly subjecting to potential liability a person who causes or attempts to cause a financial institution to fail to file a required report or who causes a financial institution to file a required report that contains material omissions or misstatements of fact. In addition, it would create the offense of structuring a transaction to evade the reporting requirements, without regard for whether an individual transaction is, itself, reportable under the Bank Secrecy Act.

In light of this new legislation, there is no reason to expect that the previous conflict among the circuits will persist. Accordingly, review by this Court is unwarranted.

b. In any event, the court of appeals' decision is correct under the law as it existed prior to the enactment of the Money Laundering Control Act of 1986.

The court below did not address in detail the underlying question whether a third party who causes a bank to breach its reporting obligations may be held liable under Section 5313, having resolved that issue in its earlier decision in *United States* v. *Heyman*, 794 F.2d 788 (2d Cir.), cert. denied, 479 U.S. 989 (1986). In *Heyman*, the court of appeals had held that although the duty to file CTRs is imposed only on financial institutions, a third party who causes the institution to violate its duties may be convicted under 18 U.S.C. 2(b).[5] That holding comports with the broad language of Section 2(b), which extends liability to anyone who "causes an act to be done which if directly performed by him or another would be an offense against the United

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[5] Correspondingly, a third party who conspires to cause a bank to violate its reporting obligations may be convicted under 18 U.S.C. 371. See *United States* v. *Sans*, 731 F.2d 1521, 1530-1532 (11th Cir. 1984), cert. denied, 469 U.S. 1111 (1985); *United States* v. *Lester*, 363 F.2d 68, 73-74 (6th Cir. 1966), cert. denied, 385 U.S. 1002 (1967).

States." As the reviser's note to 18 U.S.C. 2 states, the aiding and abetting statute

> removes all doubt that one who puts in motion or assists in the illegal enterprise but causes the commission of an indispensable element of the offense by an innocent agent or instrumentality, is guilty as a principal even though he intentionally refrained from the direct act constituting the completed offense.[6]

Those principles apply here as well. A bank customer's success in preventing the bank from filing CTRs cannot shield him from liability under Section 2(b). Petitioner was lawfully convicted on that basis.

Petitioner contends (Pet. 24-34), however, that by enacting the 1986 amendments to the CTR provisions – which, petitioner admits (Pet. 24-25), squarely apply to his conduct – Congress effectively acknowledged that the CTR

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[6] The reviser's note also indicates that Section 2 was intended to embrace this Court's decision in *United States* v. *Giles*, 300 U.S. 41, 43 (1937). There, the Court upheld the conviction of a bank teller under a statute that prohibited bank employees from "mak[ing] any false entry in any book * * * of [a] Federal reserve bank or member bank." The defendant was convicted of having caused a bookkeeper for the bank to make false deposit entries in the bank's ledger, by wrongfully withholding from circulation certain deposit slips prepared for particular bank customers. Although the defendant had not himself made the false entries, and although the "innocent bookkeeper was the teller's * * * unconscious agent," the Court held that "the statute [was] broad enough to include deliberate action from which a false entry by an innocent intermediary necessarily follows." 300 U.S. at 48-49. So, too, for Section 2(b): it applies even where the defendant, by his actions, causes an innocent intermediary unwittingly to violate the law. Accord *United States* v. *Ruffin*, 613 F.2d 408, 412-413 (2d Cir. 1979); *United States* v. *Catena*, 500 F.2d 1319, 1322-1323 (3d Cir.), cert. denied, 419 U.S. 1047 (1974); *United States* v. *Levine*, 457 F.2d 1186, 1188-1189 (10th Cir. 1972); *United States* v. *Lester*, *supra*.

provisions, as unamended, did not cover petitioner's conduct in 1982. That contention is meritless. As the court of appeals observed, when Congress enacted the 1986 amendments it "voiced no opinion as to the correctness of the [Second] [C]ircuit's position on the issue." Pet. App. A4. When it acts to resolve a conflict among the circuits, Congress cannot be assumed to have concluded that the position it rejects was the correct reading of prior law; as in this case, Congress may have acted simply to correct confusion among the circuits, even if it regards the amended statute as consistent with the proper interpretation of the prior law. Thus, no inference can be drawn "from the fact that Congress found it necessary to clarify the Bank Secrecy Act through the enactment of § 5324." *Ibid.*

2. Petitioner contends (Pet. 43-64) that his trial and appellate attorneys deprived him of the effective assistance of counsel. Both the district court and the court of appeals examined that claim and rejected it as meritless. Indeed, the district court, which tried the case originally, found that petitioner's defense counsel had made "a sincere and appealing impression before the jury." Pet. App. A10. In addition, the district court explained that it had "examined the briefs filed by petitioner's appellate counsel" and did "not deem them incompetent." *Id.* at A12. To the contrary, the district court observed, the briefs were "forceful, articulate and coherent." *Ibid.* The court of appeals reached the same conclusion. *Id.* at A5. Petitioner's factbound challenge to those conclusions warrants no further review.[7]

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[7] In any event, petitioner's claims of incompetent counsel are meritless. For example, he contends (Pet. 46-48) that his trial counsel mistakenly failed to object to evidence of bank deposits made more than five years before petitioner was indicted. But as the trial court noted (Pet. App. A10-A11), petitioner was charged with causing a failure to file CTRs "as part of a pattern of illegal activity involving currency transactions." C.A. App. 597. "The statute thus makes a con-

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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tinuing course of conduct illegal, and the statute of limitations does not bar proof of such a course of conduct if any part of it falls within the statutory period." Pet. App. A11. Moreover, petitioner was charged with conspiracy, and the government was therefore entitled to prove overt acts outside the statute of limitations, provided that at least one overt act fell within the statutory period. Petitioner also contends (Pet. 51-57) that his trial counsel failed to object to certain testimony of one of the government's witnesses. He does not, however, explain why, had the testimony been precluded, "the result of the proceeding would have been different." *Strickland* v. *Washington*, 466 U.S. 668, 694 (1984). And because none of petitioner's legal contentions is meritorious, there is likewise no merit to his contention (Pet. 61-64) that appellate counsel erred in failing to challenge the effectiveness of petitioner's trial attorney.

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